

JUL 29 1977

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term 1977

No.

77-1651

JAMES DOUGLAS MCMILLEN,

Petitioner,

vs.

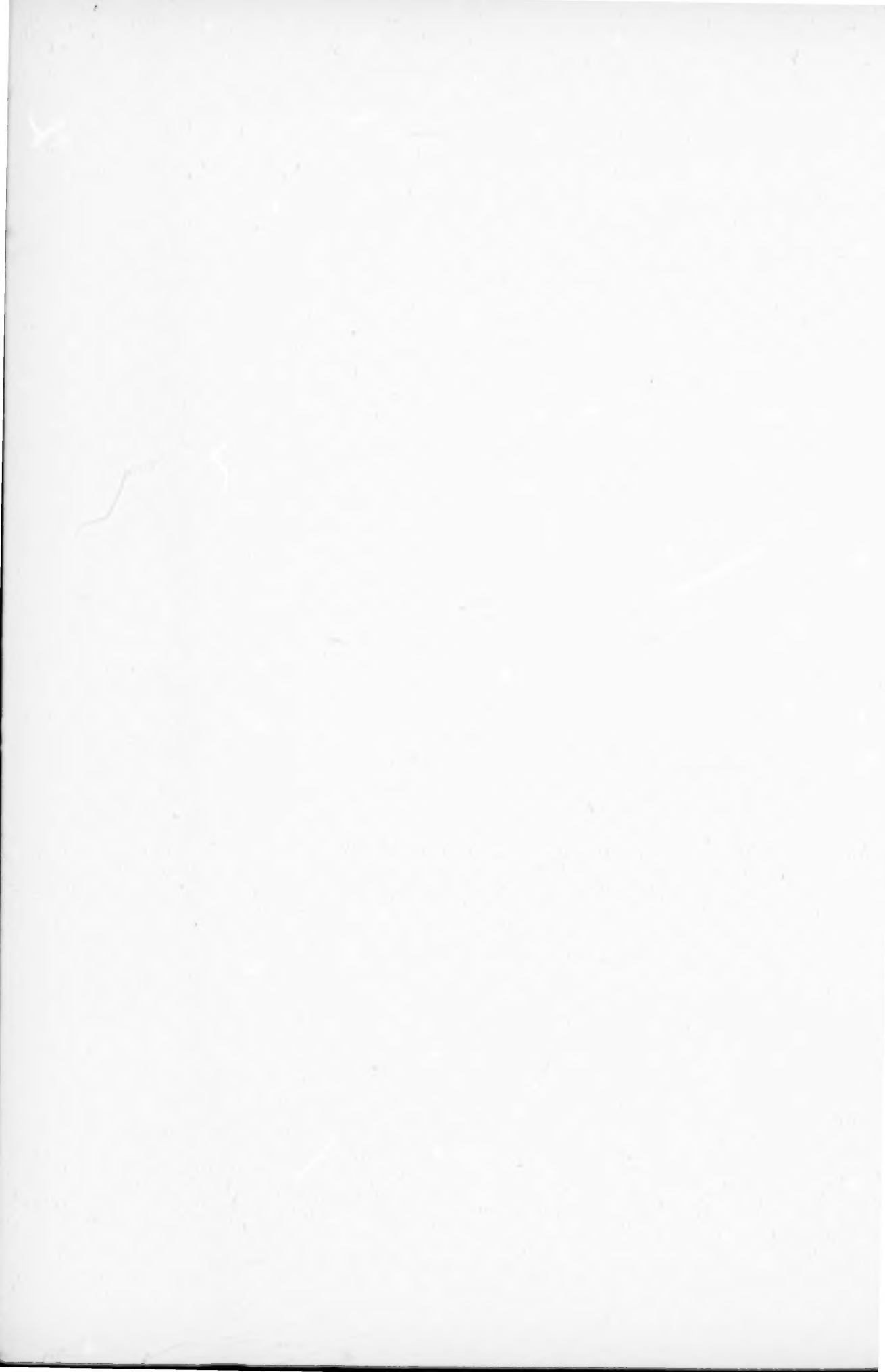
LOUIS J. LEFKOWITZ,

Attorney General of the
State of New York,

Respondent.

**PETITION FOR A WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.**

James D. McMillen
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108
Petitioner



In The
Supreme Court of the United States

October Term 1977

No.

JAMES DOUGLAS MCMILLEN,
Petitioner,

vs.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Respondent.

**MOTION FOR LEAVE TO FILE A
PETITION FOR A WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.**

TAKE NOTICE that upon the brief, papers and proceedings in this case, the undersigned will move this Court for an Order granting to the Movant, leave to file a petition for a writ of mandamus to Louis J. Lefkowitz, Attorney General of the State of New York, upon the grounds more fully set forth in the petition hereto attached, and for such other and further relief as to this Court may seem proper.

July 22, 1977

JAMES D. MCMILLEN
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108



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In The
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No.

JAMES DOUGLAS MCMILLEN,
Petitioner,

vs.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Respondent.

**PETITION FOR A WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.**

Petitioner James Douglas McMillen respectfully prays that a writ of mandamus be issued to Louis J. Lefkowitz, Attorney General of the State of New York, commanding and directing that Louis J. Lefkowitz, Attorney General of the State of New York, forthwith return to the petitioner, all records of the petitioner, seized and in his possession on and since January 17, 1975; and further that this court grant such other and further relief as may be just in the premises.

JURISDICTION

Petitioner currently faces a criminal trial in the State Court System of the State of New York for which records sought herein are vital and without which, no fair defense can be had. Petitioner has sought within the State Court System to have the records be ordered to his possession. Courts of the State of New York have refused to rule on his application under a defense of "res judicata", advanced due to a pending 42 U.S.C. 1983 action, pending before the U.S. Court of Appeals for the Second Circuit. Petitioner has made application to the Second Circuit for a writ of mandamus and has been denied.

The immediate pendency of a criminal trial and the vital and essential need for the possession of the business records of the defendant to prepare his defense at trial, precludes further exploring the appeals system within the State of New York. Jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1651(a).

QUESTION PRESENTED

Can the Attorney General of the State of New York, continue to hold and possess records of the petitioner which were seized on January 17, 1975, without knowledge or forewarning to the owner, and deny the petitioner his records, while a criminal issue is before the courts wherein the petitioner must have his records to prepare a defense; due to a pending review of a 42 U.S.C. 1983 action.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

"Nor shall any person . . . be deprived of life, liberty, or property, without due process of law"

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

Fourteenth Amendment to the Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS

On January 17, 1975, agents of the Attorney General of the State of New York, unlawfully seized and took continuing possession of certain of petitioner's business and personal records. This action was executed without knowledge or warning to the petitioner, and was done in and through an instrument ostensibly purporting to be a subpoena duces tecum upon a third party, but was in fact, an unlawful instrument which seized petitioner's records. (Instrument/subpoena is attached herewith as Appendix A.)

Since January 17, 1975, the Attorney General of the State of New York has continued to possess and still does possess - now for a period of more than thirty months, these records of the petitioner, doing so against his will, and refusing to return them to him.

Currently the petitioner herein faces a criminal trial in the Schenectady County Court of New York, on charges relating to tax matters. Obvious then, because of the nature of the charges, is the need for the availability of business records to be able to prepare a fair and adequate defense by the defendant-petitioner to the charges.

After having been indicted in the Schenectady County Court on tax matters, the petitioner has sought to obtain possession of his own lawful property. Pursuant to the provisions of statutory law of the State of New York, on March 19, 1977, petitioner filed for a Declaratory Judgment in the Supreme Court of the State of New York, County of Albany, seeking a declaration that the original instrument was in itself unlawful, and further ordering that the unlawful subpoena be quashed and that the records be returned to the petitioner. (Attached herewith as Appendix B.)

Prior to the current indictment on tax matters (on August 27, 1975), petitioner herein had filed an action under 42 U.S.C. 1983, seeking damages from the Attorney General of the State of New York, from a "series" of invasions of his constitutional rights. Among a group of items presented was the subpoena referred to herein. It did not constitute plaintiff's case in itself, but was only one of a sequence of documents and actions, submitted as evidence. In the 42 U.S.C. 1983 action, plaintiff did not pray for the return of the records, but rather damages for unlawful acts.

Trial was held in the U.S. District Court for the Northern District of New York, and on November 19, 1976, plaintiff received an unfavorable directed verdict. This unfavorable directed verdict is currently under appeal to the U.S. Court of Appeals for the Second Circuit. Briefs have been filed and the case is awaiting assignment of a date for oral argument.

When on March 19, 1977, petitioner sought to obtain an order from the Supreme Court of the State of New York, Albany County, directing the return of his records (now vitally needed for a fair defense to the criminal trial), the Attorney General of the State of New York requested the court not to grant the petitioner's application, advancing a defense of "res judicata", alluding to the pending 42 U.S.C. 1983 action. In this instance then, the court therefore dismissed the petition.

Recognizing that the pending criminal trial was already now docketed on the "ready docket" for trial; traditional processes of appeal was not available to this petitioner within the Court systems of the State of New York. Additionally, the Attorney General of the State of New York had advanced a shield of res judicata, hiding behind the pending case before the U.S. Court of Appeals for the Second Circuit. Accordingly, petitioner herein filed a petition for a writ of mandamus in the U.S. Court of Appeals for the Second Circuit, setting forth that the pending appeal in no way precluded ordering the return of this petitioner's

records to him, and that they were urgently needed. On July 22, 1977, the U.S. Court of Appeals for the Second Circuit denied petitioner's application without comment.

At this point, the only available possible relief lies in the Supreme Court. There are no contested issues of fact in the matter. There is no question that the lawful owner of the records (of which there are many), is James D. McMillen. Further, there is no question that he is a defendant in a criminal tax trial now pending in the Schenectady County Court in New York. Further, there has been no question that the Attorney General has McMillen's records and that he obtained them in and through the instrument attached herewith as appendix A. Finally, there is no question as to his need for them on an immediate basis as he cannot be afforded any fair and just trial without access and possession of his own records, now illegally held for thirty months. Thus, this writ of mandamus sought is of urgent importance and must come from the Supreme Court.

REASON FOR GRANTING THE WRIT

PETITIONER'S APPLICATION TO THE SUPREME COURT FOR A WRIT OF MANDAMUS SHOULD BE GRANTED BECAUSE IT IS THE ONLY REASONABLE AND AVAILABLE MEANS OF AFFORDING HIM HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW.

At this point, we must consider what the issues involve. James D. McMillen is facing a criminal trial on tax matters in the Schenectady County Court, in the State of New York. More than two years ago, he found himself in a skirmish with the Attorney General of the State of New York concerning his business practices. At that time, (January 17, 1975), the Attorney General of the State of New York, under his own authority pursuant to Executive Law in the State of New York, issued a document which commanded a former secretary of McMillen to "forthwith produce and surrender" to the Attorney General of the State of New York, all business records and personal records of McMillen. It has been admitted that this was done without the knowledge of McMillen, forewarning or notice.

We cannot here ignore that this initial act was unlawful. Even a cursory examination of the document used (attached herewith as Appendix A) will show that it could not survive challenge, had challenge been available. It was executed only because it was done secretly and without the knowledge of McMillen. Testimony in previous trial will show that the person upon whom it was served was a collaborator with the Attorney General of the State of New York, and that she had told employees of McMillen that she had thrown the records out. Therefore, McMillen was without knowledge of the bogus subpoena which had taken his records and therefore, couldn't challenge it.

Then we must consider the pending 42 U.S.C. 1983 action, now before the U.S. Court of Appeals for the Second Circuit. This was an action seeking damages from a series of invasions of

the constitutional rights of McMillen. It is essential to realize that McMillen's action was founded upon several averments:

1. Accusations of harassment and duress.
2. Unlawful search of McMillen's business premises.
3. Unlawful seizure of certain of McMillen's property.

Emphatically it must be stressed to the court that the base of litigation was broader than the incident of the bogus subpoena used to seize his records. More importantly, the 42 U.S.C. 1983 action - filed on August 27, 1975, did not seek the return of the records; rather, damages from the unlawful acts.

With the above brief explanation of the pending case on appeal, it should be "removed" from the mind of the court and "forgotten". This is true for two reasons:

1. Regardless of the outcome on appeal, it will not dispose of the question of the records, nor will it order their return to McMillen.
2. Winning or losing a 42 U.S.C. 1983 action involves much more than the facts. To be successful a plaintiff must establish that the act was committed under color of state law; that it was an ultra vires act, outside the scope and duties of the responsibilities of the person committing the act; personal knowledge; malice, and further, the absence of "good faith belief".

The above then makes it apparent that alluding to a pending appeal in a 42 U.S.C. 1983 action offers no justification for a defense of "res judicata", when the action is one to dispose of the question of the records, and ordering their return to McMillen. Moreover, in McMillen's brief supporting his action to regain

possession of the records, he fully stressed to the court, that the questions were not logically dependent upon each other, and that the pending appeal was not dispositive of the question advanced before the court.

The results of the above must be viewed by the Court as a dilemma:

1. Can the criminal trial court continually postpone trial due to the unavailability of the records to McMillen, thus, despite McMillen being otherwise ready and demanding of trial. Does such continued postponement represent a denial of McMillen's entitlement to a "speedy trial" under the Fifth Amendment to the U.S. Constitution. Further, does holding a criminal trial in abeyance pending the entire appellate procedure in a 42 U.S.C. 1983 action, clearly deny McMillen's right to a speedy trial.
2. Can a pending appeal in a 42 U.S.C. 1983 action be used as a "shield" to defeat an action to correctly return records illegally seized via a bogus subpoena.

Clear then is the urgent need for the Supreme Court to grant this extra ordinary writ. McMillen faces a criminal trial which will either be endlessly postponed pending possible years of appellate exercise, thus denying him an opportunity to a speedy trial; or, in the alternative, he faces a criminal trial without any opportunity to an adequate and fair defense, and no opportunity to prepare a defense. Both of the above alternatives are intolerable and contrary to the rights of McMillen.

On the other hand, McMillen has exhausted all other reasonable remedies. He has sought action within the state court system in the State of New York, and being denied, has sought a writ

of mandamus from the Circuit Court for the Second Circuit. Here also his petition was denied. Accordingly, the only possible escape from the above dilemma rests in the Supreme Court of the United States, and short of its' immediate action, the rights of McMillen are automatically lost.

CONCLUSION

For the reasons urged herein, petitioner respectfully prays that a writ of mandamus be issued out of this honorable Court, directing and commanding the Honorable Louis J. Lefkowitz, Attorney General of the State of New York to forthwith return to petitioner, all records, papers, and documents taken by him on January 17, 1975; and that further, the Court grant to James D. McMillen such other and further relief as may be just in the premises.

Respectfully submitted,

JAMES D. MCMILLEN
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

July 22, 1977

APPENDIX A

THE PEOPLE OF THE STATE OF NEW YORK

TO: SANDRA CADAN
• 1465 Lexington Ave.
Schenectady, New York

GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you produce forthwith and surrender to an agent of Louis J. Lefkowitz, Attorney General of the State of New York, all records, documents, papers, notes, memoranda, appointment books and materials of whatever kind and whatever nature relating to the business and affairs of either James D. McMillian and/or Therapeutic Hypnosis, Inc., a domestic corporation which is required in an inquiry by the Attorney General to determine whether an application should be made or an action should be instituted pursuant to subdivision 12 of section 63 of the Executive Law and which the Attorney General deems relevant and material to the inquiry. For a failure to produce the items herein specified, you will be liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and Fifty Dollars in addition thereto.

WITNESS, Honorable LOUIS J. LEFKOWITZ, Attorney General of the State of New York, the 17th day of January, 1975.

Assistant Attorney General

The witness is bound by this subpoena to appear at the trial, hearing or examination and at any adjourned date -
C.P.L.R.

APPENDIX B

STATE OF NEW YORK SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of
JAMES D. MCMILLEN,

Petitioner,

NOTICE OF
PETITION

For an Order and Declaratory Judgment
that LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Respondent,

pursuant to section 3001 of the Civil Practice Laws and Rules, and pursuant to the provisions of the Constitution of the United States of America, Amendments IV and V; has, unlawfully inflicted upon the petitioner the abuse of unlawful search and seizure in and through the issuance of an illegal document which is unlawful and contrary to the constitutional rights of the petitioner; and that petitioner had certain personal and business property and records unlawfully seized and still in the possession of Louis J. Lefkowitz; and pursuant to section 2304 of the Civil Practice Laws and Rules, for an Order quashing said unlawful subpoena and further directing Louis J. Lefkowitz to return forthwith all materials thereby illegally seized.

S I R S:

PLEASE TAKE NOTICE that upon the petition, affidavit and supporting papers of James D. McMillen, verified the ____th day of March, 1977, an application will be made to this Court at Special Term, Part I thereof, to be held at the Albany County Courthouse in Albany, New York on the 11th day of April, 1977 at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for summary judgment, an Order and Declaratory Judgment granting the relief demanded in the petition.

DATED:

Yours, etc.

JAMES D. MCMILLEN
Petitioner Pro Se
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

TO: LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Office & P.O. Address
The Capitol
Albany, New York 12224

(Signed and Dated)

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of
JAMES D. MCMILLEN,

Petitioner,

For an Order and Declaratory Judgment
that LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

PETITION

Respondent,

pursuant to section 3001 of the Civil Practice Laws and Rules, and pursuant to the provisions of the Constitution of the United States of America, Amendments IV and V; has, unlawfully inflicted upon the petitioner the abuse of unlawful search and seizure in and through the issuance of an illegal document which is unlawful and contrary to the constitutional rights of the petitioner; and that petitioner had certain personal and business property and records unlawfully seized and still in the possession of Louis J. Lefkowitz; and pursuant to section 2304 of the Civil Practice Laws and Rules, for an Order quashing said unlawful subpoena and further directing Louis J. Lefkowitz to return forthwith all materials thereby illegally seized.

James D. McMillen, appearing herein Pro Se, complaining of the respondent, alleges upon personal knowledge, information and belief:

AS AND FOR A FIRST CAUSE OF ACTION
AGAINST THE RESPONDENT LOUIS J.
LEFKOWITZ, ATTORNEY GENERAL OF
THE STATE OF NEW YORK.

FIRST: That the respondent Louis J. Lefkowitz is the Attorney General of the State of New York, an elected public official, whose principal office is located in the Capitol, in the City of Albany, County of Albany, New York.

SECOND: That the petitioner James D. McMillen is a resident of the State of Ohio, living in the City of Toledo, Ohio. Further that petitioner was formerly a resident of the State of New York, residing in the Town of Altamont, County of Albany, and operated and held business interests in the City of Schenectady, County of Schenectady, New York, as well as other locations across the State of New York.

THIRD: That during the month of January 1975, respondent was embarked upon an investigation of the personal and business activities of the petitioner; said investigation being in the lawful conduct of the duties and responsibilities of the elected position held by the respondent.

FOURTH: That on the date of January 17, 1975, respondent did issue an illegal document which was described in writing as a "subpoena" and described orally to its recipient as a "subpoena duces tecum".

FIFTH: That the aforementioned legal document commanded Mrs. Sandra Cadan, a former secretary of the petitioner whose employment had been terminated by the petitioner, to

produce and surrender to the Attorney General of the State of New York any records, business or personal, of petitioner James D. McMillen, or his business Therapeutic Hypnosis, Inc. (Note: a copy of the illegal document is attached as exhibit (1) to this petition.)

SIXTH: That pursuant to the illegal document the respondent did unlawfully seize certain records, books and properties of James D. McMillen.

SEVENTH: That the execution of the illegal document to seize the property of James D. McMillen was done without the knowledge of, or notice to James D. McMillen.

EIGHTH: That the illegal document issued was neither a subpoena nor a subpoena duces tecum; but rather, constituted an illegal and unlawful warrant of seizure.

AS AND FOR A SECOND CAUSE OF ACTION
AGAINST THE RESPONDENT LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE
STATE OF NEW YORK.

NINTH: That the execution of the illegal warrant of seizure is contrary to the laws of the State of New York and exceeded the statutory authority granted the Attorney General as well as his authority under Executive Law.

TENTH: That the execution of the illegal warrant of seizure has constituted an invasion against the constitutional rights of the petitioner under the Constitution of the United States of America.

AS AND FOR A THIRD CAUSE OF ACTION
AGAINST THE RESPONDENT LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE
STATE OF NEW YORK.

ELEVENTH: That the Attorney General of the State of New York has held, and still does hold, property and records illegally and unlawfully obtained by way of an illegal seizure warrant, which was executed as previously detailed.

TWELTH: That the continued impoundment and illegal possession of property of James D. McMillen, illegally obtained by way of an illegal and unlawful seizure warrant, is contrary to the rights of the petitioner.

THIRTEENTH: That a legal opinion as to the lawful sufficiency of the document used to obtain possession of the records is vital to the petitioner in the determination of possible recourse and possible damages.

WHEREFORE: petitioner prays that a judgment be granted:

- (a) Issuing a declaratory judgment that the document issued to obtain the records of James D. McMillen from Sandra A. Cadan, was not a lawful subpoena, or a subpoena duces tecum; but rather constituted an unlawful and illegal warrant of seizure, contrary to law and the authority of the Attorney General of the State of New York.
- (b) That the execution of the unlawful and illegal warrant has constituted an invasion of the constitutional rights of the petitioner.
- (c) That an Order be entered, quashing the document herein complained of, and declaring same to be null and void.
- (d) Issuing an Order to the Attorney General to return forthwith to James D. McMillen,

-7b-

any and all materials obtained as a result of
the execution of the illegal warrant of seizure.

DATED:

Respectfully submitted,

(Signed and Dated)

JAMES D. MCMILLEN
Petitioner Pro Se
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

THE PEOPLE OF THE STATE OF NEW YORK

TO: SANDRA CADAN
1465 Lexington Ave.
Schenectady, New York

GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you produce forthwith and surrender to an agent of Louis J. Lefkowitz, Attorney General of the State of New York, all records, documents, papers, notes, memoranda, appointment books and materials of whatever kind and whatever nature relating to the business and affairs of either James D. McMillian and/or Therapeutic Hypnosis, Inc., a domestic corporation which is required in an inquiry by the Attorney General to determine whether an application should be made or an action should be instituted pursuant to subdivision 12 of section 63 of the Executive Law and which the Attorney General deems relevant and material to the inquiry. For a failure to produce the items herein specified, you will be liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and Fifty Dollars in addition thereto.

WITNESS, Honorable **LOUIS J. LEFKOWITZ**, Attorney General of the State of New York, the 17th day of January, 1975.

Assistant Attorney General

The witness is bound by this subpoena to appear at the trial, hearing or examination and at any adjourned date -
C.P.L.R.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of
JAMES D. MCMILLEN,

Petitioner,

For an Order and Declaratory Judgment
that LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

AFFIDAVIT

Respondent,

pursuant to section 2001 of the Civil Practice
Laws and Rules, and pursuant to the provisions
of the Constitution of the United States of
America, Amendments IV and V; has, unlawfully
inflicted upon the petitioner the abuse of unlaw-
ful search and seizure in and through the issuance
of an illegal document which is unlawful and con-
trary to the constitutional rights of the petitioner;
and that petitioner had certain personal and business
property and records unlawfully seized and still
in the possession of Louis J. Lefkowitz; and
pursuant to section 2304 of the Civil Practice Laws
and Rules, for an Order quashing said unlawful
subpoena and further directing Louis J. Lefkowitz
to return forthwith all materials thereby illegally
seized.

STATE OF OHIO)
COUNTY OF LUCAS) SS:

JAMES D. MCMILLEN, being duly sworn, deposes and says:

1. That he presently is a resident of the State of Ohio, living in the City of Toledo, County of Lucas, Ohio.

2. That during the period July 1972 through April 1975, he was a resident of the State of New York.

3. That during the aforementioned period of time, he offered a service of hypnosis to the public in the State of New York; initially as an individual doing business as Therapeutic Hypnosis, and subsequently through a corporation of which he was Chairman of the Board, its' Chief executive officer, and its incorporator. Further, that the corporation was organized under the laws of the State of New York and was incorporated under the name Therapeutic Hypnosis, Inc.

4. That during the period of October 1972 through January 1975, he did employ one Sandra A. Cadan as a personal secretary and receptionist; first in his personal practice and subsequently by the corporation he administered.

5. That in January 1975, affiant did fire Sandra Cadan, and did terminate her employment.

6. That on the final day of employment, officers of the corporation did confront Mrs. Cadan, seeking to have those business records she was responsible for maintaining.

7. That on that date Mrs. Cadan "lied" to the officers of the corporation by stating that she "had thrown them out".

8. That sworn testimony under oath in a criminal trial of the affiant (People v McMillen), conducted in the Schenectady County Court in November, 1975) indicated that in fact she had knowingly lied to the officers of the corporation about the records.

9. That the Attorney General of the State of New York did prepare a "document" and called it a "subpoena"; serving it upon Mrs. Cadan on January 17, 1975.

10. That an agent of the Attorney General's office, one John A. Neuberger, did serve the document on Mrs. Cadan on January 17, 1975, and did that day, take possession of "one large cardboard box" of records papers, and appointment books, of the affiant and affiants business both personal and corporate.

11. That all of the above acts were committed without the knowledge of or notice to James D. McMillen, the affiant herein.

12. That since January 17, 1975, the Attorney General has held the property illegally seized, and still does hold the property illegally seized.

13. That such a seizure of affiant's property was unlawful, illegal, and was an invasion of the constitutional rights of James D. McMillen.

DATED:

JAMES D. MCMILLEN

Sworn to and subscribed before me
this ____th day of March, 1977.

Notary Public
(Signed, Dated, Sealed and Stamped)

VERIFICATION

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

JAMES D. MCMILLEN, being duly sworn deposes and says that: he is the petitioner in the foregoing petition and is fully familiar with all the facts and circumstances therein.

Further, affiant avows that he has read the foregoing petition and that the statements contained therein are true to his own knowledge, information and belief.

JAMES D. MCMILLEN

Sworn to and subscribed before
me this _____th day of March, 1977.

(Signed, Dated, Sealed and Stamped)

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF ALBANY

X

In the Matter of the Application of
JAMES D. McMILLEN,

Petitioner,

For an Order and Declaratory Judgment that
LOUIS J. LEFKOWITZ, Attorney General of
the State of New York,

Respondent,

pursuant to section 3001 of the Civil Practice Laws and Rules, and pursuant to the provisions of the Constitution of the United States of America, Amendments IV and V; has, unlawfully inflicted upon the petitioner the abuse of unlawful search and seizure in and through the issuance of an illegal document which is unlawful and contrary to the constitutional rights of the petitioner; and that petitioner had certain personal and business property and records unlawfully seized and still in the possession of Louis J. Lefkowitz, and pursuant to section 2304 of the Civil Practice Law and Rules, for an Order quashing said unlawful subpoena and further directing Louis J. Lefkowitz to

return forthwith all materials thereby
illegally seized.

X

Albany County Special Term, April 22, 1977
Motion No. 67

Justice Robert C. Williams, presiding.

APPEARANCES: James D. McMillen, pro se.
 5325 Sanders Road
 Toledo, Ohio 43615

 Hon. Louis J. Lefkowitz,
 Attorney General.
 Michael F. Colligan, of Counsel.
 The Capitol, Albany, New York

WILLIAMS, J.

Petitioner proceeds by CPLR Article 78 for a judgment declaring that respondent has illegally seized certain of petitioner's business records and ordering respondent to return all of said records.

It appears that petitioner brought a civil rights action in Federal Court based on the same set of facts as alleged herein. The second and third causes of action in the Federal Court complaint contain substantially the same allegations as alleged in the petition herein. Petitioner has filed a notice of appeal to the Second Circuit Court of Appeals from an adverse verdict in District Court. Therefore, there being another action for similar relief pending and additionally, the principle of res judicata being

applicable, this proceeding may not be maintained.
CPLR 3211(a)(4)(5).

Accordingly, the petition is dismissed.

Submit judgment.

(All papers to Hon. Louis J. Lefkowitz, Michael F. Colli-
gan, of Counsel for submission of judgment and filing.)

Dated: May 13, 1977
Monticello, New York

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES D. MCMILLEN,

Petitioner,

vs

LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

PETITION FOR
WRIT OF MANDAMUS
Respondent.

Jurisdictional Statement

Jurisdiction comes in and through the pendency of an appeal currently before the U.S. Court of Appeals for the Second Circuit. In the instance of the cause of action contained in this petition for a Writ of Mandamus, the courts of the State of New York have declined to review the matter due to the pending appeal before this Second Circuit. The requested direction and enforcement of this Writ of Mandamus is essential and is sought on an immediate and urgent basis. Petitioner is unable to pursue normal channels of appeal, and requires immediate action upon his instant request to prevent serious, and irreparable damage to the petitioner.

Statement of the Action

Now comes JAMES D. MCMILLEN, and files this his petition for a Writ of Mandamus against the Honorable Louis J. Lefkowitz, Attorney General of the State of New York, and respectfully represents:

1. That on January 17, 1975, the respondent herein did take, seize and possess certain business and personal records of the petitioner.

2. That such action was committed pursuant to a document which was ostensibly alleged to be a subpoena duces tecum, but in fact lacked the essential ingredients to be a lawful subpoena duces tecum. A copy of said document is attached herewith as exhibit (1).

3. That the vehicular document commanded a third party to surrender records of this petitioner to the respondent. Further, that this act was executed without any knowledge, warning or notice to this petitioner, whose records were seized.

4. That since January 17, 1975, respondent has held, possessed, and still does possess the materials and records of the petitioner.

6. That circumstances of the seizure of these records and property of the petitioner, subsequently became one act of a series of acts complained of in and through an action filed against the respondent by the petitioner, under 42 U.S.C. 1983; wherein petitioner sought damages from a collected "series of acts" which were violative of petitioner's constitutional rights.

7. That on April 13, 1977, petitioner filed an action in the Supreme Court of the State of New York, for the County of Albany, seeking a Declaratory Judgment, and asking the court to hold the document of seizure to be unlawful and to quash same and to order and direct the respondent to return the seized records to the petitioner.

8. That the demands of the action filed in the Supreme Court of the State of New York were urgent, vital, and required immediate action by the court for the following reasons:

- a. That pursuant to a collateral action of the Attorney General of the State of New York, the petitioner now faces a criminal action and trial in the County Court of Schenectady County New York.
- b. That the charges of the criminal action involve allegations of tax evasion and the filing of and payment of taxes.
- c. That possession of business records by this petitioner is essential and vital to the preparation of a defense and any opportunity to a fair trial.
- d. That petitioner's property now seized and held by the respondent for twenty-nine months, prevents petitioner from preparing a defense to the action against him in the County Court.

9. By request of the respondent's answering papers in the action in the Supreme Court of the State of New York, the Honorable Robert C. Williams, dismissed petitioner's action seeking to recover the records and refused to review same, on the alleged defense of "res judicata" which contended that the court was prevented from reviewing the action due to the pending appeal on the 42 U.S.C. 1983 action, currently before the Second Circuit Court of Appeals.

10. That the principle of "res judicata" was incorrectly extended to the matter before the court for the following reasons:

- a. The pending 42 U.S.C. 1983 action did not seek an Order returning the records. The matter was a damage suit seeking resti-

tution for damages from a series of acts of which petitioner complained.

- b. The matter was and is, in no way dispositive of the question of the records - now in possession of the Attorney General of the State of New York.
- c. Success or failure on appeal in a 42 U.S.C. 1983 action involves questions other than regaining possession of the records.
- d. To succeed in such an action, a plaintiff must establish:
 - 1. Acting under Color of State Law.
 - 2. Ultra vires acts, outside the scope of duties and responsibilities.
 - 3. Malice.
 - 4. Personal knowledge and supervision.
 - 5. The absence of a "good faith-belief" defense.

(Note: In other words, a plaintiff in such an action may establish facts of an invasion of constitutional rights in such an action; but yet lose his case due to a successful defense of "good faith-belief").

11. That irrespective of all other questions and matters before any and all courts, the petitioner herein is unquestionably entitled to possession of his property.

12. That irrespective of any questions being reviewed by any courts, the petitioner must have his records returned to him, to allow a fair and just defense to the forthcoming criminal trial in which he is the defendant.

13. That any system of appeals is inadequate and time precludes such process. The pending criminal trial is scheduled for trial during the month of June, 1977. It therefore demands

the instant return of petitioner's records to him.

14. That the act of ordering the return of petitioner's records to him does not in itself, in any way alter, affect, or change the review of the Second Circuit, of the pending 42 U.S.C. 1983 action.

WHEREFORE: James D. McMillen, through the aid of this honorable Court, respectfully requesting, prays:

1. That a Writ of Mandamus be issued out of this honorable Court, directing and commanding the Honorable Louis J. Lefkowitz, Attorney General of the State of New York, to forthwith return to petitioner, all records, papers, and documents taken by him on January 17, 1975.

2. That the Court grant to James D. McMillen such other and further relief as may be just in the premises.

DATED:

(Signed and Dated)

JAMES D. MCMILLEN
Petitioner
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

VERIFICATION

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

JAMES D. MCMILLEN, being duly sworn deposes and says that he is the petitioner in the above entitled action; that

he has read the foregoing petition and that to the best of his information and belief, the facts therein stated are true.

DATED:

JAMES D. MCMILLEN

Sworn to and subscribed before me
this _____ day of June, 1977.

Notary Public

AFFIDAVIT OF SERVICE

Undersigned certifies that the above petition was served upon the Respondent Louis J. Lefkowitz, by mailing a copy thereof to Louis J. Lefkowitz, Attorney General of the State of New York, The Capitol, Albany, New York (Michael Colligan of Counsel); doing same on June 8, 1977.

DATED:

JAMES D. MCMILLEN

(Signed, Dated, Sealed and Stamped)

THE PEOPLE OF THE STATE OF NEW YORK

TO: SANDRA CADAN
1465 Lexington Ave.
Schenectady, New York

GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you produce forthwith and surrender to an agent of Louis J. Lefkowitz, Attorney General of the State of New York, all records, documents, papers, notes, memoranda, appointment books and materials of whatever kind and whatever nature relating to the business and affairs of either James D. McMillian and/or Therapeutic Hypnosis, Inc., a domestic corporation which is required in an inquiry by the Attorney General to determine whether an application should be made or an action should be instituted pursuant to subdivision 12 of section 63 of the Executive Law and which the Attorney General deems relevant and material to the inquiry. For a failure to produce the items herein specified, you will be liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and Fifty Dollars in addition thereto.

WITNESS, Honorable **LOUIS J. LEFKOWITZ**, Attorney General of the State of New York, the 17th day of January, 1975.

Assistant Attorney General

The witness is bound by this subpoena to appear at the trial, hearing or examination and at any adjourned date -
C.P.L.R.

APPENDIX E

PRO SE
6/14/77
77-3038

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of June, one thousand nine hundred and seventy-seven.

James D. McMillen,

Appellant,

v.

Louis Lefkowitz, Attorney General
of the State of New York,
Appellee.

A motion having been made herein by Appellant pro se for a writ of mandamus

Upon consideration thereof, it is
Ordered that said motion be and it hereby is denied.

(Signed)

J. Joseph Smith

James L. Oakes

JLO JJS

Circuit Judges